

May 3, 2002

Secretary
Federal Communications Commission
445 12th St SW
Washington D C 20554

RE: Docket No. 02-33

The Oregon Public Utility Commission (OPUC) appreciates the opportunity to comment on the Federal Communications Commission's (Commission) Notice of Proposed Rulemaking concerning the appropriate framework for regulating (or deregulating) broadband access to the Internet over wireline facilities. The Commission sets out its primary goal as "to encourage the ubiquitous availability of broadband to all Americans." It desires to do so by including in its framework all platforms through which broadband services can be offered, and minimizing regulation in a way that "promotes investment and innovation in a competitive market."

While the stated goals are laudable, the Commission suggests ways to achieve them that are not backed up by a rigorous analysis. Indeed, continued progress in the availability of broadband services raises a serious question as to whether even a draconian change in regulation, such as Title I treatment of wireline broadband services, would have any impact at all on their availability. Further, the larger problem for widespread deployment seems to be that consumers generally do not subscribe to broadband services even when they are available. Increased availability of broadband services, however achieved, is unlikely to affect consumer subscribership rates by the more than 85 percent of Americans to whom, according to Chairman Powell, service under at least one platform is already available. Instead, frequent and numerous proposals to change regulatory activities discourages marketplace activity because it results in litigation and uncertainty.

1. The Commission's application of the definition of a competitive marketplace to the case of broadband services falls short in several areas. A perfectly competitive marketplace has many buyers and sellers. While the broadband marketplace has many potential buyers, it currently has only four sellers - platforms, in this case – to choose from. If there were a large number of platforms, none of which is large enough to influence price in the marketplace, and all of which compete with each other with ease of entry into and exit from the market, then minimal regulation might foster competition. But reality is that the number of platforms is small and limited. Ease of entry and exit does not exist for platforms. It takes a long time for a new platform to become established. None of the existing platforms – wireline, wireless, cable, and satellite – is likely to exit the market any time soon. Input prices experienced by producers vary

markedly by platform because the technologies are so different. Consumers cannot easily change from using one platform to using another. The equipment for each is different and the features offered are not identical. Large players within some platforms act as monopolies. Predictions made from the strained application of classic economic theory to competition between broadband platforms are precarious at best. They are hardly a basis upon which to make a profound regulatory change. Pages 2 through 8 of the Florida Public Service Commission's April 3, 2002 comments in this docket provide an excellent analysis of the existing marketplace. The Commission should consider this analysis carefully when reviewing comments in this docket.

2. Broadband service is not sufficiently distinguishable from narrowband service to warrant separate regulatory treatment. The suggestion that transmission over a high speed line in connection with Internet access service should result in different regulatory treatment of the transmission portion of the service should not be implemented. The main difference between narrowband service and broadband service is speed. Internet services can be provided over an ordinary modem using a narrowband line. While some functionalities are slow and awkward, many consumers find this method of Internet access sufficient for their needs. A Qwest local exchange customer can use a Qwest dial-up Internet service through a narrowband voice line, yet the Commission is not suggesting that the transmission in this instance should be considered for a new type of regulatory treatment, even though the company providing the transmission is also providing the Internet access service. Some information-type services can even be performed over a voice line without using a modem. For example, the Internal Revenue Service accepts filing of extensions of the tax return deadline via a toll-free number. After using a touch tone phone to enter data, the taxpayer receives a computation of the amount of taxes owed and an identification number for future reference. As technology changes, the logic behind attempts at distinguishing between technologies in order to suggest different regulatory treatments may become even more unsound. Information travels more quickly over fiber optic lines than over copper wire, but a new type of regulatory treatment for fiber optics is not being proposed. The differences between narrowband and broadband services do not justify a new type of regulatory treatment for broadband transmission services.

3. Changing the regulatory treatment of broadband transmission services will harm competition. While straining to apply the principles of a competitive marketplace to between-platform competition, the Commission suggests that important conditions that have resulted in competition to provide broadband services within the wireline platform might now be removed. The implication of Title I regulatory treatment of broadband transmission bundled with Internet access service is that DSL would no longer be available as an unbundled network element. The Telecommunications Act of 1996 attempted to encourage competition within the wireline telecommunications platform by encouraging competing firms to enter the marketplace. While these newer competing firms struggle increasingly over regulatory uncertainties, existing firms have merged and broadened their marketplace presence. Only a regulatory presence that mitigates the monopoly powers of incumbent local exchange carriers can hope to offer an opportunity for competition within the wireline platform. Now the Commission suggests that it might sacrifice the competition that has been created within the wireline platform in order to encourage competition between platforms, in the interest of expanding the availability of

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broadband services. Consumer benefits and subscribership that have been achieved through competition within the wireline platform could be lost as a result.

A settled regulatory environment that provides competitors tools they need to provide broadband services to consumers, consistent with the provision of the Telecommunications Act of 1996, is a better option for consumers than monopoly control over the marketplace. We have seen numerous examples in the past where deregulation of telecommunications services has led to higher prices and poorer service rather than investment and innovation. In the current economy, where large incumbent exchange carriers have seen stock prices and shareholder dividends plummet, decreasing regulation of broadband services and setting up conditions for monopoly provision of those services may well lead to higher prices for existing customers to increase revenues in order to satisfy shareholders, with little or no additional infrastructure investment beyond that already planned.

4. A focus on the major problem – lack of subscribership where broadband services are available – might yield a better approach. If actions could be taken to increase consumer demand for broadband services, then it would be easier to make a business case to invest in infrastructure in currently unserved areas. And this is precisely the goal the Commission wishes to achieve – "to encourage the ubiquitous availability of broadband to all Americans." We encourage the Commission to study this aspect of the problem, in partnership with state commissions, before undertaking massive regulatory changes that may not achieve the desired goal.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
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cc: Qualex International